IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-658, 78-678

UTAH POWER & LIGHT COMPANY and COLORADO RIVER WATER CONSERVATION DISTRICT, *et al.*, *Petitioners*,

v.

ENVIRONMENTAL DEFENSE FUND, INC.;

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND, INC. IN OPPOSITION

GEORGE W. PRING
PAULA C. PHILLIPS
1657 Pennsylvania Street
Denver, Colorado 80203

WILLIAM A. BUTLER
1525 18th Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent Environmental Defense Fund, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-658

UTAH POWER & LIGHT COMPANY, *Petitioner*,

v.

ENVIRONMENTAL DEFENSE FUND, INC.;

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT, *et al.*, *Petitioners*,

v.

ENVIRONMENTAL DEFENSE FUND, INC.;

and

DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT ENVIRONMENTAL DEFENSE FUND, INC. IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals for the District of Columbia Circuit are fully presented in the briefs for the petitioners. The opinions are now unofficially reported at 12 BNA Env. Rep. Cas. 1001 (D.D.C. 1978); 12 BNA Env. Rep. Cas. 1255 (D.C. Cir. 1978).

JURISDICTION

The jurisdictional requisites adequately appear in the petitioners' briefs.

STATUTE INVOLVED

At issue in these intervention denials is Rule 24(a)(2) of the Federal Rules of Civil Procedure,[1] which provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[1] Although petitioners Colorado River Water Conservation District *et al.* include Fed. R. Civ. P. 24(b) (permissive intervention) as a "statute involved" in this case, petitioners do not challenge the District Court's denial of permissive intervention under that Rule. Such a denial is unappealable absent abuse of discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524-25 (1947). Petitioners did not raise the issue of permissive intervention in the Court of Appeals.

QUESTION PRESENTED

This lawsuit challenges federal government approval of inadequate, state-adopted water quality standards and control plans for salinity pollution in the Colorado River Basin. Below, twenty applicants—the seven basin states and thirteen substate entities—have moved to intervene in support of federal defendants. The District Court granted intervention to the seven states, granted limited intervention to four other applicants, and denied intervention to the nine remaining applicants. The question presented is:

Whether the District Court so abused its discretion or misapplied the law in granting and denying intervention to the twenty applicants before it as to justify overturning the District Court's decision and the Court of Appeals' summary affirmance.

STATEMENT OF THE CASE

Salinity pollution is acknowledged to be "the most serious water quality problem in the Colorado River Basin."[2] In 1972, the seven Colorado River Basin

[2] U.S. ENVIRONMENTAL PROTECTION AGENCY, THE MINERAL QUALITY PROBLEM IN THE COLORADO RIVER BASIN, SUMMARY REPORT (1971) at 5. *See* DEPARTMENT OF THE INTERIOR, *et al.*, FINAL ENVIRONMENTAL STATEMENT, COLORADO RIVER WATER QUALITY IMPROVEMENT PROGRAM (1977) at I-8 through I-21.

Salinity, in fresh water, is the total of all dissolved solids or salts present (TDS). Salinity decreases crop yields and potability, damages domestic and industrial facilities and equipment, causes increased treatment costs and environmental damage, and, at high levels or prolonged exposure, poses a serious hazard to human health. Federal defendants estimate the "economic magnitude" of salinity damages to be one to 1.5 billion dollars (present value) between now and the year 2000 without effective controls. *Id.* at I-21. These damages will be suffered by the more than two million

states adopted a policy of maintaining salinity concentrations at or below levels then found in the river's lower main stem.[3] In 1974, Congress incorporated this policy in the Colorado River Basin Salinity Control Act.[4] In 1975-76, pursuant to Section 303 of the Federal Water Poilution Control Act,[5] each of the seven basin states formally adopted water quality standards and implementation plans for salinity that included maintenance of 1972 salinity levels. Each state's standards and plan were approved by the Environmental Protection Agency.[6]

Plaintiff Environmental Defense Fund (EDF) brought this action on August 22, 1977, challenging the inadequacy of the state standards and plans to achieve their own agreed objective—maintenance of 1972 salinity levels. Naming as defendants the Administrator of the Environmental Protection Agency (EPA), the Secretary of the Interior, and the Commissioner of the Bureau of Reclamation, EDF's six-count complaint requests declaratory, injunctive, and mandatory relief (a) to set aside EPA's approval of the deficient state-

---

Americans residing in the 242,000-square-mile basin and by the additional twelve million people outside the basin who rely on diversions of Colorado River water for agricultural, industrial, and domestic uses.

[3] U.S. Environmental Protection Agency, Proceedings, Conference In The Matter of Pollution of The Interstate Waters of The Colorado River and Its Tributaries (Apr. 26-27, 1972) at 169.

[4] Section 201(a), 43 U.S.C. § 1591(a) (Supp. V 1975).

[5] 33 U.S.C. § 1313 (Supp. V 1975).

[6] EPA approved the state standards and plans by letters of Oct. 8, 19, 22, and 23, 1976.

promulgated water quality standards and implementation plans for salinity pollution, (b) to require EPA to develop (through public proceedings) effective controls on salinity, and (c) to require all defendants to develop and implement necessary salinity control measures.[7]

During the six months following filing of the complaint, twenty public and private entities moved for intervention on the side of the federal defendants: the states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; Mountain States Legal Foundation; National Water Resources Association; Colorado Water Congress; Yuma Auxiliary Project; Metropolitan Water District of Southern California; Colorado River Water Conservation District; Southwestern Water Conservation District; Northern Colorado Water Conservancy District; City of Colorado Springs Water Conservancy District; City of Aurora, Colorado; Board of Water Works, City of Pueblo, Colorado; City and County of Denver Acting By and Through Its Board of Water Commissioners; and Utah Power & Light Company.

Both plaintiff EDF and federal defendants supported the intervention applications of the seven basin states as the authors of the challenged water quality standards and plans and as the representatives of their citizens' interests in the case. Both plaintiff EDF *and*

---

[7] The lawsuit is based on defendants' violations of three federal statutes: the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (Supp. V 1975), as amended; the Colorado River Basin Salinity Control Act of 1974, 43 U.S.C. § 1591 *et seq.* (Supp. V 1975); and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970), as amended.

federal defendants opposed the intervention of the thirteen various substate entities.

On January 19, 1978, the District Court granted the motions to intervene of the seven basin states. On April 20, 1978, the Court issued a 17-page opinion and order granting limited intervention to Mountain States Legal Foundation, National Water Resources Association, Colorado Water Congress, and Yuma Auxiliary Project, and denying intervention to the remaining nine substate applicants.[8] The nine entities denied intervention promptly moved for summary reversal. Plaintiff EDF and federal defendants both moved for summary affirmance. By *per curiam* order of July 31, 1978, the Court of Appeals for the District of Columbia Circuit affirmed the District Court's order.[9]

Utah Power & Light Company, one of the public utilities in the basin, petitioned this Court for a writ of certiorari on October 18, 1978. Colorado River Water Conservation District; Southwestern Water Conservation District; Northern Colorado Water Conservancy District; City of Colorado Springs; City of Aurora; Board of Water Works, City of Pueblo; and the City and County of Denver—all state or municipal water suppliers in the basin—petitioned for a writ of certiorari on October 20, 1978.[10]

During the pendency of these intervention motions and appeals, the case has proceeded toward trial in the District Court. By order of December 23, 1977, the District Court denied federal defendants' motion for transfer of venue to the District of Colorado.[11] By order of September 1, 1978, the Court denied defendants' motions for judgment on the pleadings.[12] Discovery is now almost completed, and plaintiff anticipates moving for summary judgment on all or the majority of the counts in early 1979.

[8] Opinion reproduced in full in petitioners' briefs.

[9] *Id.*

[10] The Metropolitan Water District of Southern California did not petition for a writ of certiorari.

ARGUMENT

Petitioners, eight of twenty applicants in intervention in this case, seek review of their intervention denials by the District Court as affirmed by the Court of Appeals for the District of Columbia Circuit. All petitioners seek the identical outcome as the federal defendants, *viz.*, validation of present state and federal control plans for salinity pollution. On the law and the facts of this case, the petitions for a writ of certiorari should be denied.

Faced with a factually complex case with significant implications for resource planning and development for a large geographic region, the District Court carefully weighed the numerous intervention requests before it, considering both the applicants' stake in the outcome and their potential contribution to it. It exercised its discretion with considerable delicacy, admitting as intervenors of right the seven state applicants, admitting for limited purposes four substate applicants, and denying intervention to the nine remaining substate applicants.

[11] This order is unofficially reported at 12 BNA Env. Rep. Cas. 1079 (1977).

[12] This order is unofficially reported at 12 BNA Env. Rep. Cas. 1131 (1978).

Such discretion is controlled by the terms of Federal Rule of Civil Procedure 24(a)(2), which provide:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The District Court based its denial of intervention to petitioners upon its finding that their interests were adequately represented by existing parties.[13] Petitioners' challenge to these decisions of the trial judge familiar with the case and the reviewing appellate court is really an attack upon the representative capacity of the states and a demand for special treatment among the millions of citizens with an equivalent interest in controlling salinity pollution in the basin. The opinions of the courts below are clearly correct.

I. The Opinion of the District Court

The opinion of the District Court is a model of careful application of established precedent to the facts before the court. In its 17-page opinion, the District Court considered in turn the merits and demerits of each applicant's claim to intervention of right.

[13] EDF fully supports the District Court's denial of intervention and the Court of Appeals' affirmance based upon adequacy of representation. EDF continues to maintain, however, that petitioners meet *none* of the three requisites for intervention. Their alleged interests and impairments are so generalizd, speculative, and irrelevant to the specific issues of the case that they cannot support intervention of right unless that right extends to every one of the million of Colorado River water users.

A. Colorado River Water Conservation District, et al.

Turning first to petitioners Colorado River Water Conservation District, *et al.*, the Court recognized at the outset that "the seven entities in this group are all state or municipal public entities from the state of Colorado." [14]

The District Court undertook a lengthy consideration of adequacy of representation. The starting point for this analysis was this Court's holding in *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) that intervenors' burden of demonstrating potential inadequacy of representation is a minimal one. The Court then examined at length the federal court precedents relied upon by the applicants in intervention, correctly concluding that the narrow scope of judicial review applicable here and petitioners' intimate relationship with the existing state parties distinguish the instant case.[15]

For additional guidance, the District Court looked to this Court's enunciation of the doctrine of *parens patriae* in *New Jersey* v. *New York*, 345 U.S. 369 (1953). That case arose in a factual setting strikingly similar to the one at bar. In an original action by the

[14] Memorandum Opinion and Order (D.D.C. April 20, 1978), reproduced as Appendix 2 to Petition of Colorado River Water Conservation District *et al.* (hereafter cited as "D. Ct. Op., Colo. Districts' brief") at 9a.

[15] The cases analyzed by the District Court are *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (D.C. Cir. 1977); *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); and *New York P.I.R.G., Inc.* v. *Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975). *See* D. Ct. Op., Colo. Districts' brief at 12a-14a.

state of New Jersey challenging the state of New York's planned diversion of Delaware River water, the state of Pennsylvania had successfully moved to intervene. When Philadelphia, a home-rule city, sought to intervene several years later when New York petitioned to reopen the case, this Court denied the additional intervention. The Court's reasoning, quoted by the District Court below and by the Court of Appeals in affirmance, bears clear relevance to this case:

> The "*parens patriae*" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana,* 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 372-373.

Pinpointing a problem of identical concern in the instant case, the *New Jersey* Court explained the serious complications that a contrary rule would raise:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems,

> and which will insist upon a right to intervene if Philadelphia is admitted. Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.

Id. at 373 (footnote omitted). Therefore, the Court concluded: "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.*

As the District Court below recognized, although *New Jersey* v. *New York* involved this Court's original jurisdiction, the principle and rationale of *parens patriae* there enunciated are not to be mechanically limited to Supreme Court practice, but may be considered and applied by other courts, as well.[16]

Completing its consideration of the intervention application of petitioners Colorado River Water Conservation District *et al.*, the District Court found on the facts and record in this case:

> All of the entities in Group I are state agencies or offices, or municipalities within the state of Colorado. None have offered any compelling reason or circumstance in which they validly differ with the position taken by the state of Colorado. The formulation of these salinity control standards were expressly left to the states of the Colorado

---

[16] *See* D. Ct. Op., Colo. Districts' brief, at 15a-16a, citing *Pennsylvania* v. *Rizzo,* 530 F.2d 501, 505 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976).

> River Basin. The various public subdivisions which here seek to intervene do not allege that the states or the federal government acted illegally in promulgating these regulations. The issues of the allocation of the water levels approved, or the implementation of these regulations are not before this court. As such, the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states.[17]

Accordingly, the Court denied intervention of right because representation by the state intervenors was adequate.

B. Utah Power & Light Company

Turning to the intervention motion of Utah Power & Light Company (UP&L), the District Court once again took up the question of adequate representation. The Court was clearly impressed by the affirmative averments of representative capacity submitted to the Court by UP&L's states of residence:

> The states of Utah and Wyoming represented to the court in their motions to intervene that they could protect the interests shared by their citizenries in water quality control, water resource planning and allocation, and the various forms of economic development dependent on the river.[18]

As the court recognized, UP&L did not quarrel with these representations, but rather claimed a "more specific" interest demanding separate representation.

---

[17] *Id.* at 16a.

[18] D. Ct. Op., Colo. Districts' brief, at 18a. These representations are quoted in part in footnote 41, *infra*.

Again beginning its analysis with *Trbovich* v. *United Mine Workers*, the District Court noted that the burden of showing inadequate representation, though minimal, remains upon the applicant in intervention. Surveying relevant federal court cases,[19] the Court concluded that assertion of a narrower interest than that of a party to the case will support intervention where (1) the court will perform a quasi-administrative function, (2) the applicant's interest is actually adverse to the governmental representative's, or (3) the case involves an area of economic regulation in which the state admits its representative incapacity. None of these conditions, the court observed, pertain here:

> This case deals only with the adequacy of the salinity standards promulgated by the states and whether the Administrator fulfilled his statutory duty in approving these plans. As such, the parties are limited to arguing for or against the validity of these regulations. Individual interests such as those U.P.&L. seeks to advance are largely irrelevant.[20]

Moreover, the District Court specifically found that "UP&L's arguments directed at the subject matter of this case will be cumulative of the arguments advanced by the other defendants."[21] For these reasons and on

---

[19] *Natural Resources Defense Council* v. *Costle*, 561 F. 2d 904 (D.C. Cir. 1977); *United States* v. *Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); *New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976) *cert. denied*, 429 U.S. 1121 (1977); *New York P.I.R.G., Inc.* v. *Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975).

[20] D. Ct. Op., Colo. Districts' brief, at 18a-19a. (Petitioners omit the word "only" from their reproduction of this passage from the District Court's opinion.)

[21] *Id.* at 19a.

the clear facts of this record, the Court denied UP&L's motion for intervention of right.

II. The Opinion of the Court of Appeals

Affirming *per curiam* the District Court order, the Court of Appeals for the District of Columbia relied primarily on the guidance of *New Jersey* v. *New York* and the principle of *parens patriae*. Like the District Court, the Court of Appeals was obviously influenced by the states' authoritative assertions of representativeness upon their own motions to intervene, noting:

> The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and citizens' views on water plans and rights as they relate to this case once they have intervened to represent these subdivisions and citizens.[22]

Concluding that the record did not demonstrate that appellants possessed any "compelling interest in [their] own right" warranting mandatory intervention,[23] the Court of Appeals affirmed the District Court order denying intervention.

III. Petitioners' Arguments

This detailed review of the opinions of the District Court and Court of Appeals below is made necessary

---

[22] Memorandum opinion (D.C. Cir. July 31, 1978), reproduced as Appendix 1 to Petition of Colorado River Water Conservation District, *et al.* (hereafter cited at "Ct. Aps. Op., Colo. Districts' brief") at 3a-4a.

[23] *Id.* at 3a, quoting *New Jersey* v. *New York*, 345 U.S. at 373. Although the Court of Appeals referred to this test as "strict," it made clear in a footnote that a "showing of *concrete* adverse interests of state and locality in this context" would be sufficient to secure intervention of right. *Id.* at 4a, n. 3.

by the arguments of petitioners, who seek to oversimplify and trivialize beyond recognition the work of these courts in coping sensitively and fairly with numerous intervention requests in a large and complex case. Casting about for some issue that might "dress up" their routine appeal in Supreme Court style, petitioners seize upon the lower courts' consideration of the *parens patriae* principle of *New Jersey* v. *New York* and attempt to tear it from the context of the lower court opinions.

Petitioners insist that the doctrine of *parens patriae* applies only in cases brought under this Court's original jurisdiction, because *New Jersey* v. *New York* was such a case.[24]

As the Court of Appeals pointed out below, however, the opinion in that case "places little emphasis on the fact that the case was within the Court's original jurisdiction. . . ."[25] The *New Jersey* Court stated that the *parens partiae* doctrine:

> is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working

---

[24] UP&L brief at 9-12; Colo. Districts' brief at 9-10. UP&L notes that "every opinion of this Court citing *New Jersey* has been in a case involving original jurisdiction." UP&L brief at 10, n. 4. This is true. The Supreme Court has cited *New Jersey* only twice, in *Illinois* v. *City of Milwaukee, Wisconsin*, 406 U.S. 91, 96-97 (1972) and *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). Both of these cases "involved" the Court's original jurisdiction, and in both the Court declined to exercise it.

[25] Ct. Aps. Op., Colo. Districts' brief at 3a, n. 2.

> rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 372-73. This language clearly transcends the technical procedural posture of that one case.

Petitioners would ignore this Court's emphasis that *parens partiae* is a "*principle.*" This Court is not in the business of announcing single rules for single cases. It deals, instead, in "principles"—broad precepts that serve as the foundation for practical rules in various settings. Accordingly, the Court recognized the principle of *parens patriae* as a "working rule for good judicial administration": a *working* rule, practical and readily available, for good *judicial administration*, not just Supreme Court administration, not just awed scholarly reference. So was it applied by the courts below, as one practical guide in their consideration of adequacy of representation.

The working rule is a familiar one in a variety of descriptive terms and contexts. "[I]n the absence of a very compelling showing to the contrary, it will be assumed . . . that a state adequately represents the interests of its citizens." 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 at 528-29 (1972). In *Pennsylvania* v. *Rizzo,* 530 F.2d 501, 505, *cert. denied,* 426 U.S. 921 (1976), the Court of Appeals for the Third Circuit held:

> a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. . . . Where official policies and practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers.

See United States v. *Nevada,* 412 U.S. 534, 539 (1973) (interstate compact); *Stream Pollution Control Board of Indiana* v. *U.S. Steel, Inc.,* 62 F.R.D. 31, 35 (N.D. Ind. 1974), *aff'd,* 512 F.2d 1036 (7th Cir. 1975) (intervention); *Illinois* v. *Bristol-Myers Co.,* 470 F.2d 1276, 1278 (D.C. Cir. 1972) (intervention); *United States* v. *Crookshanks,* 441 F. Supp. 268, 270 (D. Or. 1977) (temporary restraining order).

Application of this rule is particularly appropriate here, where the states themselves possessed and exercised the ultimate authority to develop and adopt—following hearings at which interested citizens such as petitioners could make input—the very standards and plans at issue in this litigation, and petitioners seek merely to add their own redundant defense of the state standards and plans.

To counter the sensible application of *parens patriae* here, petitioners fix upon a sentence in this Court's opinion in *United States* v. *Nevada,* 412 U.S. 534 (1973). In that case, in which the Court declined to exercise its original jurisdiction, the Court did not state that individual water users would have a *right* to intervene in District Court. Rather, they would have "an opportunity to participate" in District Court proceedings, *id.* at 538—subject, as a matter of course, to the District Court's determination that the requisites of Rule 24(a)(2) were satisfied, including lack of adequate representation. Clearly the Court did not intend by this one sentence to predispose subsequent District Court proceedings by waiving the require-

ments of Rule 24(a)(2) without knowing even the identities of potential intervenors.[26]

Petitioners further urge that the use of *parens patriae* principle by the courts below "distort[s]" and "perver[ts]" Rule 24(a)(2)[27] and conflicts with its interpretation by this Court in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972).[28]

Trbovich was an action by the Secretary of Labor to set aside a union election of officers. An individual union member moved to intervene in support of the Secretary, and this Court ordered his motion granted. The Court, finding the union member's interest inadequately represented under Rule 24(a)(2), based its decision on the conflict of interest inherent in the Secretary's role under the Labor-Management Reporting and Disclosure Act, which imposed upon him a "duty to serve two distinct interests," one of which would clearly conflict with the applicant's interest. *Id.* at 538-39. In a footnote the Court added:

[26] UP&L resourcefully cites *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967) for the proposition that both a public utility and its parent state must be granted intervention in litigation in which they are interested. UP&L brief at 12, n. 5. The case is inapposite. The Supreme Court there granted intervention under former Rule 24(a)(3). That rule *imposed no requirement that inadequate representation by parties be demonstrated.* See 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 at 519 (1972). Further, the peculiar circumstances of *Cascade Natural Gas* limit the guidance it offers in other intervention cases. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1908 at 498 and n. 16 (1972) and cases there cited.

[27] UP&L brief at 13, 14.

[28] *Id.* at 16-18; Colo. Districts' brief at 13-14.

> The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

Id. at 538 n. 10.[29]

Had the courts below indeed applied a mechanical "*per se* rule of exclusion in which the state's participation in a lawsuit precludes any citizen of that state from intervening," as one petitioner interprets the opinions below,[30] Rule 24(a)(2) as illuminated by *Trbovich* would surely require reversal. The Courts below applied no such mechanical or absolute rule. The District Court began its analysis of adequacy of representation with reaffirmation of the *Trbovich* "minimal burden" standard[31] and then closely scrutinized the individual circumstances of the various applicants in intervention. It specifically found the

[29] Petitioners also cite *Hodgson* v. *United Mine Workers,* 473 F.2d 118 (D.C. Cir. 1972) and *Natural Resources Defense Council* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977) as cases adopting the *Trbovich* standard. Like *Trbovich,* however, neither case involves the adequacy of representation by a *state* of its citizens' interests. In *Costle,* distinguished by the District Court in its opinion below, Colo. Districts' brief at 12a, had the applicant rubber and chemical companies been denied intervention, their interests would have been "represented" in the action only by their competitors and the U.S. Environmental Protection Agency. In *Hodgson,* as in *Trbovich,* the purported "representative" was clearly compromised by statute. Moreover, the Court there specifically found that the relief sought by the purported "representative" falls short of what [intervenor-applicants] themselves would reasonably ask." 473 F. 2d at 130. Petitioners advance no such specific conflict in representation here.

[30] UP&L brief at 14.

[31] D. Ct. Op., Colo. Districts' brief, at 11a.

interests of the Colorado water users to be "*identical*" to the states' interests,[32] and those of UP&L to be not "actually adverse" to the states' interests.[33] This is no "*per se* rule of exclusion."

In its affirmance the Court of Appeals concluded that the applicants had failed to show "some compelling interest in [their] own right" or "*concrete* adverse interests of state and locality."[34] This standard is well established in the federal courts. *See New Mexico* v. *Aamodt*, 537 F.2d 1102, 1105-06 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) ("[S]ignificant confiicts of interest" rendered adequate representation "impossible."); *Neusse* v. *Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967) ("[T]he mere fact that there is a slight difference in interests between the applicant and the supposed representative does not show inadequacy, if they both seek the same outcome."); *Stadin* v. *Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (per Blackmun, J.), *cert. denied*, 373 U.S. 915 (1963); *Peterson* v. *United States*, 41 F.R.D. 131, 134 (D. Minn. 1966).[35]

---

[32] *Id.* at 16a (emphasis added).

[33] *Id.* at 18a.

[34] Ct. Aps. Op., Colo. Districts' brief, at 3a, 4a n. 3.

[35] Petitioners point with special indignation at their consignment by the Court of Appeals to "the internal mechanisms, such as the political processes," of the states. Ct. Aps. Op., Colo. Districts' brief, at 3a, quoted in UP&L brief at 14 and Colo. Districts' brief at 8-9, 10. In doing so, they overlook the very significant point the Court of Appeals is making about this particular case. Here, plaintiffs seek an order which would require the federal and state agencies to reopen public rulemaking to revise and improve salinity controls; this rulemaking is the "political process" in which these petitioners can properly advance their detailed opinions, expertise, and influence, and safeguard their specific interests, *on the merits*. Recognizing where the real decisionmaking will take place, the Court of Appeals was quite correct to suggest that these petitioners are one forum too early.

Petitioners have failed to satisfy the "minimal burden" standard of *Trbovich* because they have failed to make *any* showing of inadequacy of representation. Petitioners Colorado River Water Conservation District *et al.* are themselves all agencies or subdivisions of the State of Colorado and have not pointed out a single example of how the state might fail to represent them.[36] Petitioner UP&L claims broadly that "[t]he states and Utah Power are competing users of water"[37] but offers no record support for this assertion nor any indication of the manner in which any such competition might affect the states' representative capacity in this litigation. UP&L further argues that it is a "regulated user" of Colorado River water with "purely proprietary interests" distinct from the states', again offering no factual details on the record.[38] In fact, the intimate state regulation and public duties of public utilities under Utah and Wyoming law[39] suggest a concurrence, not a disparity, of interests.

---

[36] These petitioners offer the argument that the Colorado River Basin Salinity Control Act of 1974 § 201, 43 U.S.C. § 1591 (Supp. V 1975) (CRBSCA) exclusively governs control of salinity in the Colorado River Basin, and asserts that no present party has raised this issue. Colo. Districts' brief at 6-7. In fact, this interpretation of CRBSCA has been fully argued by intervenors Mountain States Legal Foundation, *et al.* *See* Memorandum [of Mountain States Legal Foundation *et al.*] in Support of Motion to Dismiss: Matters Concerning the Role of Interstate Compacts of the Colorado River on the Claims Presented by Plaintiff (June 22, 1978) at 16-25.

[37] UP&L brief at 16.

[38] *Id.* at 17.

[39] *See, e.g.*, Utah Code Ann. § 54-3-1 (1953); Wy. Stat. Ann. § 37-3-114 (1977).

Petitioners protest, finally, that the courts below "ignored" filings by the states of Wyoming and Colorado purporting to disclaim an ability fully to represent petitioners' interests in this litigation.[40] On the contrary, the courts below did not ignore these filings. The courts simply discredited them, as they deserved. These memoranda were filed by Wyoming and Colorado only after their own interventions had been assured. Both the District Court and the Court of Appeals had before them EDF's response to these memoranda demonstrating that the belated state support for other movants (1) was in substantial conflict with the states' earlier assertions of representativeness made to gain their own intervention, (2) was based erroneously on alleged interests of the sub-state applicants in no way at issue in the action, and (3) directly conflicted with state constitutional and statutory provisions, cited by the states in their applications for intervention, conferring upon them the authority and duty to represent their citizens' interests.[41]

---

[40] UP&L brief at 8; Colo. Users brief at 7, 11.

[41] *See* Plaintiff's Response to States' Memoranda in Support of Intervention by Additional Parties. In particular, EDF pointed out the detailed and comprehensive averments of representative capacity made by the states in support of their own intervention. Wyoming had declared, for example:

> "Water being essential to industrial prosperity . . . its control must be in the state, which, in providing for its use, shall equally guard all of the various interests involved."

Wyoming Motion to intervene as a defendant at 2-3, quoting from the Wyoming Constitution, art. 1, § 31.

> The broad interests sought to be asserted here by the State of Wyoming, as *parens patriae* and in her own right, include . . . her concern for the protection of numerous and diverse economic interests which are accordingly endangered.

CONCLUSION

The District Court and Court of Appeals carefully considered petitioners' motions to intervene in light of petitioners' individual interest and offerings, the nature of the case, and Rule 24(a) as interpreted by

---

Id. at 6. Indeed, Wyoming *specifically claimed a UP&L facility* as one of the projects the state seeks to represent and protect in its intervention. *Id.* at 11.

Likewise, Colorado had represented to the court, for example:

> The Governor has directed the Attorney General to seek intervention in order that the State may advance interests of Colorado in water quality and water allocation questions directly affecting the citizens of this State . . . .

Motion for Intervention by the State of Colorado at 2-3.

The states' tardy, speculative, and self-contradictory support for petitioners' interventions clearly failed to impress the District Court as manifesting the concrete adversity or conflict of interest requisite to intervention of right. The Court of Appeals obviously intended a disparaging reference to such political back-pedaling when it stated:

> The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions and citizens' views on water plans and rights as they relate to this case *once they have intervened to represent these subdivisions and citizens.*

Ct. Aps. Op., Colo. Districts' brief at 3a-4a (emphasis added). *See id.* at 4a, n. 3.

In its brief as *amicus curiae* in support of the petition for a writ of certiorari of Colorado River Water Conservation District, *et al.*, the State of Colorado renews its argument that these petitioners "are entitled . . . to a separate position" in water policy. *Id.* at 5. Nowhere, however, does Colorado give any indication of how the "positions" of the state and petitioners—its subdivisions and municipalities all seeking the same outcome in this case—are actually "separate" or different in any regard whatsoever. How many additional layers of governmental bureaucracy, all making the same arguments and representing the same position, must encumber these proceedings?

this Court. Petitioners have offered no special and important reasons for disturbing these orders. The writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. PRING
PAULA C. PHILLIPS
1657 Pennsylvania Street
Denver, Colorado 80203

WILLIAM A. BUTLER
1525 18th Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent
Environmental Defense Fund, Inc.

Counsel wish to recognize the contribution on this brief by Frederick Small, J.D.

Dated: November 29, 1978